

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2007-0009-EXEC

In the Matter of the Petitions for Reconsideration of the
**CORDUA IRRIGATION DISTRICT, EXETER IRRIGATION DISTRICT,
IVANHOE IRRIGATION DISTRICT, LINDMORE IRRIGATION DISTRICT,
NEVADA IRRIGATION DISTRICT, SAUCELITO IRRIGATION DISTRICT, AND
TERRA BELLA IRRIGATION DISTRICT**
Regarding Annual Water Right Fee Determinations

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

The Cordua Irrigation District, Exeter Irrigation District, Ivanhoe Irrigation District, Lindmore Irrigation District, Nevada Irrigation District (NID), Saucelito Irrigation District, and Terra Bella Irrigation District, collectively referred to herein as "Petitioners,"² individually petition the State Water Resources Control Board (State Water Board) for reconsideration and a refund of water right fees assessed by the State Board of Equalization (BOE) on December 19, 2006. In general, Petitioners allege that the water right fees are unconstitutional and invalid. They request the State Water Board to find that the fee assessments were improperly made and to refund Petitioners' payments. The State Water Board finds that its decision to impose the fees was appropriate and proper and denies Petitioners' petitions for reconsideration.

¹ State Water Board Resolution No. 2002 - 0104 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of petitions for reconsideration of disputed fees falls within the scope of the authority delegated under Resolution No. 2002 - 0104. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, or set aside or modify the fee assessment.

² The term "Petitioners" is used for ease of reference and does not confer the legal status of petitioner.

2.0 STATUS OF LITIGATION

The State Water Board must consider these petitions for reconsideration at a time when the statute authorizing water right fees and the basic structure of the implementing regulations are being challenged in pending litigation. Each year since 2003, fee payers (including some of the Petitioners) have filed suit against the State Water Board and BOE, alleging, in part, that the fee legislation and the State Water Board's fee regulations are unconstitutional and invalid. Some of the actions over the FY 2003-2004 fees have been consolidated and the rest have been stayed pending resolution of the consolidated case. In 2005 the Sacramento County Superior Court issued a judgment upholding the water right fees in their entirety. The Plaintiffs in that case appealed. On January 17, 2007, the Third District Court of Appeal issued a decision upholding the fee statute and invalidating the fee regulations for FY 2003-2004. The decision became final on February 16, 2007. On February 26, 2007, the State Water Board and BOE filed a petition for review by the California Supreme Court.

The Court of Appeal remands the case to the trial court with instructions to maintain the existing fee schedule until the State Water Board adopts a new fee schedule. If the California Supreme Court denies the State Water Board's petition for review, the State Water Board will be required to adopt a new fee schedule within 180 days from the date when the Court of Appeal's decision became final. Based on the revised fee schedule, the State Water Board must determine whether it improperly assessed any fees in FY 2003-2004 and develop a procedure for calculating any refunds that may be due. The Court's remedy only authorizes people who timely filed petitions for reconsideration with the State Water Board to be eligible for refunds.

The Court of Appeal's decision regarding the FY 2003-2004 fee schedule raises questions about the validity of fee schedules adopted in subsequent years. Although the Court's decision applies only to the FY 2003-2004 fees, it sets a precedent that will apply to the fee schedules for later fiscal years, including the FY 2006-2007 fee schedules at issue in this order, unless the California Supreme Court grants review. Nonetheless, it would not be appropriate to follow the Court of Appeal's decision in acting on these petitions. The State Water Board believes the Court of Appeal's decision was incorrectly decided, in several respects, and is seeking review by the California Supreme Court. If the State Water Board were to grant refunds based on the Court of Appeal's decision, however, that action would become final and unreviewable. (See Wat. Code, § 1126, subd. (d).) Applying the Court of Appeal's decision in this order would effectively deprive the State Water Board and other fee payers, who will eventually be charged

additional fees to the extent necessary to restore the condition of the Water Rights Fund, of the benefit of any subsequent decision by the California Supreme Court. (See *id.*, § 1525, subd. (d)(3) [requiring that in setting fees, the State Water Board must take into account any overcollection or undercollection in previous years].)

Moreover, applying the Court of Appeal's decision in this order would be inconsistent with the orderly process envisioned by the Court. To avoid serious disruptions of the work of the Division of Water Rights, the Court directed that the fee schedule formula as presently implemented by the State Water Board should remain in effect until the State Water Board adopts a new fee schedule in accordance with the Court's decision. The State Water Board will then reevaluate the fees of the petitioners involved in the litigation, based on the new fee schedule. That process, which the Court directed to be applied to the FY 2003-2004 fees, would also be appropriate for the subsequent fee schedules adopted before the Court's decision, including the fee schedule for FY 2006-2007. Trying to short-circuit the process, and applying the Court's decision to these petitions without first reviewing and revising the fee schedule, would result in the disruption that the Court was trying to avoid. Nor would it be feasible to adopt a new fee schedule within the statutory deadline for acting on these petitions for reconsideration. Although the State Water Board has initiated the process of determining how the fee schedule would have to be revised to conform to the Court of Appeal's decision, it will be difficult to complete the process within the 180 days prescribed by the Court of Appeal. The State Water Board has initiated its review to determine how the fee schedule for FY 2003-2004 would have to be revised as part of that process, but the process will take much longer than the timeframe for action on these petitions, and may well result in additional litigation before it is determined what revisions are necessary to comply with the Court of Appeal's decision.³

³ In acting on a petition for reconsideration, the State Water Board has authority to consider the validity of its regulations as applied to the petitioner. In appropriate cases, the State Water Board could construe the regulation in a manner that resolves the issue or determine that the regulation cannot be applied to the petitioner. The State Water Board could also conduct rulemaking proceedings to revise the fee schedule based on the information or arguments presented by the petitioner. In this case, however, the Court of Appeal has directed that the fee schedules be revised in a manner that will take several months to complete, and further directed that the fee collection process should not be disrupted. In these circumstances, and recognizing that the Court of Appeal's opinion will be superseded if the California Supreme Court grants review, it would not be appropriate to attempt to revise the regulations before acting on Petitioner's petition for reconsideration.

3.0 GROUNDS FOR RECONSIDERATION

A fee payer may petition for reconsideration of the State Water Board’s determination that the fee payer is required to pay a fee or of the State Water Board’s determination regarding the amount of the fee. (Cal. Code Regs., tit. 23, § 1077.)⁴ A fee payer may petition for reconsideration on any of the following grounds: (1) irregularity in the proceeding, or any ruling, or abuse of discretion, by which the fee payer was prevented from having a fair hearing; (2) the fee determination is not supported by substantial evidence; (3) there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced; or (4) error in law. (§§ 768, 1077.) Pursuant to Water Code section 1537, subdivision (b)(4), the State Water Board’s adoption of the regulations may not be the subject of a petition for reconsideration. When a State Water Board decision or order applies those regulations, a petition for reconsideration may include a challenge to the regulations as they have been applied in the decision or order.

A petition for reconsideration of a fee assessment must include certain information, including the name and address of the petitioner, the specific board action of which petitioner requests reconsideration, the reason the action was inappropriate or improper, the reason why the petitioner believes that no fee is due or how the petitioner believes that the amount of the fee has been miscalculated, and the specific action that petitioner requests. (§§ 769, subd. (a)(1)-(6), 1077, subd. (a).) A petition for reconsideration of a fee assessed by BOE must include a copy of the notice of assessment. (§ 1077, subd. (a).) Section 769, subdivision (c) of the regulations further provides that a petition for reconsideration shall be accompanied by a statement of points and authorities in support of the legal issues raised in the petition. If the subject of the petition relates to an assessment of a fee by BOE, the State Water Board’s decision regarding the assessment is deemed adopted on the date of assessment by BOE. (§ 1077, subd. (b).) A petition is timely filed only if the State Water Board receives it within 30 days of the date the assessment is issued. (*Ibid.*)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board’s regulations. (§ 770, subd. (a)(1).) Alternatively,

⁴ All further regulatory references are to the State Water Board’s regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

after review of the record, the State Water Board also may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

This order addresses the principal issues raised by Petitioners. To the extent that this order does not address all of the issues raised by Petitioners, the State Water Board finds that either these issues are insubstantial or that Petitioners have failed to meet the requirements for a petition for reconsideration under the State Water Board's regulations. (§§ 768-769, 1077.)

4.0 LEGAL AND FACTUAL BACKGROUND

The State Water Board's Division of Water Rights (Division) is the entity primarily responsible for administering the State's water right program. The primary source of funding for the water rights program is regulatory fees deposited in the Water Rights Fund in the State treasury. Legislation enacted in 2003 (Sen. Bill No. 1049, Stats. 2003, ch. 741) required the State Water Board to adopt emergency regulations revising and establishing water right fees and revising fees for water quality certification. (Wat. Code, §§ 1525, 1530.) Pursuant to this legislation, the State Water Board revises the fee schedule each fiscal year (FY), so that the fees will generate revenues consistent with the amount set forth in the annual Budget Act. (*Id.*, § 1525, subd. (d).) BOE is responsible for collecting the annual fees. (*Id.*, § 1536.)

In FY 2006-2007, the Budget Act appropriates \$14.105 million for the water right program, including \$13.642 million for water right administration by the State Water Board, \$35 thousand for support functions by the California Environmental Protection Agency (Cal/EPA), and \$428 thousand for water right fee collection by BOE.⁵ Most of the funding for the water right

⁵ The Budget Act of 2006 (Stats. 2006, ch. 47, as amended by Stats. 2006, ch. 48) includes a \$2.32 million loan from the Underground Storage Tank Cleanup Fund to the Water Rights Fund to be used for a new water rights information management system and to be repaid with interest by June 30, 2011. For purposes of calculating fees for FY 2006-2007, the State Water Board did not include appropriations from the Water Rights Fund attributable to this loan. Principal and interest to be repaid on the loan will be worked into the fee calculations for the years in which the loan is repaid. Subtracting the amount loaned from the Underground Storage Tank Cleanup Fund, the amount appropriated from the Water Rights Fund is \$9.846 million.

The budget figures referenced in this order for FY 2006-2007 are based on estimated expenditures for FY 2006-2007, as projected in the Governor's Budget for 2007-2008 (California Budget 2007-08, <http://www.ebudget.ca.gov/>). They differ from the line item appropriations to the State Water Board, BOE and Cal/EPA in the Budget Act of 2006 because the Budget Act includes unallocated appropriations and control sections that result in the actual amount appropriated being slightly different than the line item appropriations. The Governor's Budget for the next fiscal year includes projected expenditures for the current fiscal year, and because these projections include adjustments to take into account unallocated appropriations and control sections in the Budget Act, they provide a more accurate projection of what actual expenditures will be for the current fiscal year.

program – a total of \$12.166 million – is appropriated from the Water Rights Fund. In accordance with the Water Code fee provisions, the State Water Board sets a fee schedule each fiscal year so that the amount collected and deposited into the Water Rights Fund during that fiscal year will support the appropriation made from the Water Rights Fund in the annual Budget Act, taking into account money in the fund from other sources.⁶

At a meeting of the State Water Board held on September 21, 2006, the State Water Board adopted emergency regulations revising the water right and water quality certification fee schedule and regulations in accordance with the Budget Act of 2006. (State Water Board Res. No. 2006-0065; see Memorandum to File by Victoria Whitney, Division Chief, dated Sept. 21, 2006 [explaining basis for FY 2006-2007 fee schedule].) The State Water Board amended sections 1066 and 3833.1 of the fee regulations to increase annual permit and license fees and water quality certification fees from the fees in effect during FY 2005-2006, and to adjust certain filing fees. The emergency regulations adopted under Resolution 2006-0065 were not sent to the Office of Administrative Law for approval. The State Water Board subsequently learned that additional General Fund support in FY 2006-2007 was available to reduce the need for an increase in annual fees.

Accordingly, on November 30, 2006, the Executive Director revised and re-adopted the emergency regulations to eliminate the annual fee and filing fee increases.⁷ (State Water Board Res. No. 2006-0094-EXEC.) The fee regulations as amended were re-adopted to reinstate and allow collection of annual permit and license fees, annual water quality certification fees, and filing fees in FY 2006-2007 at the same rates and subject to the same upper limits as were in effect during FY 2005-2006. On December 19, 2006, BOE sent out notices of determination for the annual fees.

⁶ Other sources of money in the Water Rights Fund, in addition to fee collections made during the fiscal year, include unexpended reserves from fee collections in previous years (see Wat. Code, § 1525, subd. (d)(3)), penalties collected for water right violations (*Id.*, § 1551, subd. (b)), and money transferred from other funds.

⁷ Pursuant to Water Code section 7, the State Water Board is authorized to delegate authority to the Executive Director. By Resolution 2002-0104, the Executive Director's delegated authority includes the authority to revise or re-adopt emergency regulations, once adopted by the State Water Board. By Resolution 2006-0065, the State Water Board adopted emergency regulations revising the water right and water quality certification fees. Accordingly, pursuant to Water Code section 7 and Resolution 2002-0104, the Executive Director has the authority to revise and re-adopt the emergency regulations.

5.0 FEE DETERMINATIONS COVERED BY THE PETITION

Although Petitioners individually filed their petitions for reconsideration, their petitions repeat the same legal arguments nearly verbatim. It appears that Petitioners are represented by the same law firm and the petition language was copied wholesale. The petitions either were filed under the same firm's letterhead or the firm was copied on the petition. None of the petitions provide any additional arguments, information or supporting authorities that materially distinguishes it from the others. Accordingly, the State Water Board has decided to consolidate its consideration of the petitions in this order instead of issuing an individual order on each petition. Attachment 1 identifies the persons whose petitions are the subject of this order.

The State Water Board's review in this order is limited to certain annual fee assessments issued on December 19, 2006. Petitioners have submitted notices of determination for annual permit and license fees under section 1066 and annual permit and license fees passed through to Bureau of Reclamation (USBR) contractors under section 1073. To the extent that Petitioners' contentions are not relevant to any of these fee assessments for which their petition for reconsideration has been filed, those contentions are not within the scope of the petitions for reconsideration. Additionally, the State Water Board will not consider allegations if the Petitioners have failed to include points and authorities in support of the legal issues raised. (§ 769, subd. (c).)

Many Petitioners failed to include the notice of assessment with their petitions. (See § 1077, subd. (a).) Although the State Water Board requires strict adherence to the statute and regulations governing a petition for reconsideration, it can accept a timely filed petition if the petition substantially complies by providing all of the required information, in a manner that is clearly identified and readily accessible, even though the information may not be in the proper format. In this case, the State Water Board has accepted certain letters referencing the petitions that did not include a notice of assessment as long as the petitioner included and clearly identified the same information contained in a notice: the fee payer's name, either the water right or BOE identification number, the amount assessed, and the billing period or assessment date.

It bears emphasis, however, that the requirement for including a copy of the notice of assessment serves an important function. A petition is not acceptable simply because the information provided in the notice of assessment might be available somewhere in the materials

included in or incorporated by reference in the petition. The State Water Board receives a very large number of petitions for reconsideration on annual fees, which must be decided in a relatively brief period, and the information included in the notice of assessment is necessary to properly process the petitions for reconsideration. To the extent the State Water Board may be required to track down information because the petitioner fails to comply with the requirements specified in State Water Board regulations, the processing of petitions for reconsideration would be delayed, and for many petitions the staff time that would have to be devoted to the effort would be disproportionate to the amount of the fee involved. In the future, the State Water Board may deny a petition for failure to include a copy of the notice of assessment as required under the regulations, without considering whether the information that would be provided in the notice of assessment is set forth elsewhere in the petition.

6.0 PETITIONERS' ARGUMENTS REGARDING THE CONSTITUTIONALITY OF THE FEES AND THE ADMINISTRATION OF THE FEES ARE WITHOUT MERIT

Petitioners raise a variety of constitutional and statutory challenges to the water right fees, including claims that: (1) the fees are unconstitutional and invalid because they were adopted in violation of law, (2) the fees impose a new tax in violation of California Constitution Article XIII A (Proposition 13), (3) the fees are unconstitutionally discriminatory as applied to water right holders, (4) the fees amount to an unlawful tax or *ad valorem* tax prohibited by Proposition 13, and (5) the fee regulations are inconsistent with statutory mandates that a state agency can only adopt a fee schedule that does not exceed the reasonable cost of providing services necessary to the agency's regulatory activity.

In addition, Exeter Irrigation District, Ivanhoe Irrigation District, Lindmore Irrigation District, Saucelito Irrigation District, and Terra Bella Irrigation District contest the imposition of fees passed through to the USBR's contractors. (§ 1073, subd. (b).) These Petitioners claim that assessment of the pass-through fees was inappropriate because the USBR's sovereign immunity extends to its Central Valley Project (CVP) water service contractors. They also assert that because the State Water Board has determined that the CVP contractors are not legal users of water,⁸ there is no basis for assessing a fee against them.

⁸ In making this assertion, these petitioners simply repeat arguments from previous years, without taking into account recent developments. In *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 799-803 [39 Cal.Rptr.3d 189, 288 – 291], the Court of Appeal construed the term "legal user of water" to include water supply [footnote continues on next page]

The State Water Board previously considered and rejected Petitioners' same arguments raised in their petitions for reconsideration challenging the FY 2004-2005 and FY 2005-2006 water right fees. The State Water Board denied the petitions raising general arguments about the annual water right fees in Order WRO 2005-0004-EXEC and denied the petitions contesting the pass-through fees in Order WR 2005-0008-EXEC. These arguments were similarly addressed in Order WR 2006-0002-EXEC. The petitions now before the State Water Board repeat the same arguments nearly verbatim. Petitioners have not provided any new arguments, new information, or supporting authorities that materially change any of the issues raised in the earlier petitions.⁹ With respect to the issues that were raised in the previous petitions and are repeated in the petitions now before the State Water Board, this order adopts the reasoning of Order WRO 2005-0004-EXEC, Order WR 2005-0008-EXEC, and Order WR 2006-0002-EXEC, and incorporates the reasoning of those orders by reference. The petitions are denied for the reasons set forth in those orders.

7.0 CONCLUSION

For the reasons discussed above, the State Water Board finds that its decision to impose water right fees was appropriate and proper. To the extent that this order does not address all of the issues raised in the petitions for reconsideration, the State Water Board finds that either these issues are insubstantial or that Petitioners have failed to meet the requirements for a petition for reconsideration under the State Water Board's regulations. The petitions for reconsideration are denied.

contractors. The State Water Board has followed the Court of Appeal's interpretation. (See, e.g., SWRCB Order WR 2006-0007 at p. 5.)

⁹ The Court of Appeal's January 17, 2007 opinion with respect to the FY 2003-2004 fees includes arguments that were not raised in previous petitions. As explained in Section 2.0 of this order, however, the State Water Board is seeking California Supreme Court review of the opinion, and it would not be appropriate to apply the Court of Appeal's opinion in this order.

ORDER

IT IS HEREBY ORDERED THAT the petitions for reconsideration are denied.

Dated: March 19, 2007

ORIGINAL SIGNED BY
Thomas Howard
Acting Executive Director

Attachment

NOTE: This order includes a correction to Footnote 5 made on April 6, 2007.
(Wat. Code, § 1124.)

In the matter of the Petition for Reconsideration of the Cordua Irrigation District, et. al.
 Attachment 1: Petitioners for Reconsideration

Name	State Water Board ID
Cordua Irrigation District	A009927
Cordua Irrigation District	A012371
Exeter Irrigation District	USBR1291
Exeter Irrigation District	USBR1292
Ivanhoe Irrigation District	USBR1284
Ivanhoe Irrigation District	USBR1285
Lindmore Irrigation District	USBR1281
Lindmore Irrigation District	USBR1282
Nevada Irrigation District	A001270
Nevada Irrigation District	A001614
Nevada Irrigation District	A001615
Nevada Irrigation District	A002275
Nevada Irrigation District	A002276
Nevada Irrigation District	A002372
Nevada Irrigation District	A002652A
Nevada Irrigation District	A002652B
Nevada Irrigation District	A004309
Nevada Irrigation District	A004310
Nevada Irrigation District	A005193
Nevada Irrigation District	A006229
Nevada Irrigation District	A006529
Nevada Irrigation District	A006701
Nevada Irrigation District	A006702
Nevada Irrigation District	A008177
Nevada Irrigation District	A008178
Nevada Irrigation District	A008179
Nevada Irrigation District	A008180
Nevada Irrigation District	A015525
Nevada Irrigation District	A020017
Nevada Irrigation District	A020072
Nevada Irrigation District	A021151
Nevada Irrigation District	A021152
Nevada Irrigation District	A024983
Nevada Irrigation District	A026866
Nevada Irrigation District	A027132
Nevada Irrigation District	A027559
Saucelito Irrigation District	USBR1294
Saucelito Irrigation District	USBR1295
Terra Bella Irrigation District	USBR1288